

104 FERC ¶ 61,273
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Saltville Gas Storage Company, L.L.C.

Docket Nos. CP02-430-001
and CP02-430-002

ORDER DENYING REQUESTS FOR REHEARING,
DIRECTING COMPLIANCE FILING, AND
AUTHORIZING SERVICE ON AN INTERIM BASIS

(Issued September 11, 2003)

1. Saltville Gas Company, L.L.C. (Saltville) and Dominion Greenbrier, Inc. (Dominion Greenbrier) separately request rehearing of the Commission's order issued on February 4, 2003,¹ granting Saltville a limited jurisdiction blanket certificate pursuant to Section 284.224 of the Commission's regulations.² In its request for rehearing, Dominion Greenbrier contends that the Commission erred by finding that Saltville qualifies for the Hinshaw exemption set forth in Section 1(c) of the Natural Gas Act (NGA). Saltville requests rehearing of the Commission's rejection of Saltville's state-approved rates as the rates for interstate transportation under Saltville's limited jurisdiction blanket certificate.

2. For the reasons discussed herein, this order grants Dominion Greenbrier's request for rehearing and denies Saltville's. In view of this finding, the Commission is directing Saltville to file for the requisite NGA certificate authorizations for its facilities and services. However, to avoid interrupting or delaying the storage of gas supplies for the upcoming winter heating season, the Commission will authorize Saltville to provide service under its Section 284.224 certificate authority on an interim basis, as discussed herein.

¹102 FERC ¶ 61,123 (2003). On March 2, 2003, the Commission issued a tolling order solely for the purpose of affording additional time for the consideration of Saltville's and Dominion Greenbrier's rehearing requests.

²18 C.F.R. § 284.224 (2002) provides that a Hinshaw pipelines' interstate services under that section are subject to the same terms and conditions as intrastate pipelines' services under Section 284.224(e) Section 311 of the Natural Gas Policy Act (NGPA). Those conditions are set forth at 18 C.F.R. §§ 284.121-126.

Background

3. Saltville is a limited liability company. Its two members are NUI Saltville Storage, Inc., a wholly-owned subsidiary of NUI Corporation, and Duke Energy Saltville Gas Storage, L.L.C., a wholly-owned subsidiary of Duke Energy Gas Transmission.

4. On August 6, 2002, Saltville obtained construction authorization from the Commonwealth of Virginia State Corporation Commission (Virginia Commission) to construct underground gas storage facilities utilizing four depleted salt caverns in Smyth and Washington Counties, Virginia.³ Saltville placed its stage-one storage facilities in service on August 1, 2003. Saltville's current working gas storage capacity is 1.112 Bcf. It is continuing to develop its facilities and expects to increase its working storage capacity each year over the next five years to approximately 6.1 Bcf. Appurtenant facilities include a 24-inch diameter pipeline seven miles in length, originating at the storage facility in the Town of Saltville, Virginia, and terminating in Chilhowie, Virginia. Saltville shares this pipeline, in addition to certain other facilities, with its affiliate, Virginia Gas Pipeline Company (Virginia Gas Pipeline), which owns pipeline and storage facilities and operates a Hinshaw regulated by the Virginia Commission.

Cargill, Inc. v. Saltville Gas Storage Company, L.L.C. (Cargill v Saltville)⁴

5. On January 3, 2002, Cargill filed a complaint alleging that Saltville was undertaking the construction of jurisdictional facilities and services without the requisite NGA certificate authorization. At the time, the Virginia Commission had not yet acted on Saltville's application for a construction certificate, and Saltville had not commenced construction.

6. In the Cargill v. Saltville proceeding, Saltville stated that it had met with every Virginia LDC to discuss its proposed storage service. Saltville submitted letters in support of its project from Virginia companies stating that they would probably use the Saltville facilities for storage service. Saltville represented that a substantial number of

³Virginia Commission Order Granting Certificate, Case No. PUE-2001-00585 (August 6, 2002).

⁴99 FERC ¶61,043 (2002).

customers to be served by the Saltville facility are located in Virginia and that "a great deal of gas will be consumed" in Virginia.⁵

7. Saltville further stated that it anticipated storing gas supplies to be used as fuel at power plants to be constructed by Duke Energy Wythe, LLC (Duke Wythe) in Wythe County, Virginia, and by Henry County Power, LLC (Henry County Power) in Henry County, Virginia. In view of these expectations, Saltville represented that "a significant number of [Saltville's] customers are going to be basically Virginia customers, Virginia generation customers."⁶ Saltville emphasized that, before undertaking any interstate services not shielded by the Hinshaw exemption, it would apply pursuant to Section 284.224 of the Commission's regulations for an NGA certificate of limited jurisdiction authorizing such service.⁷ However, Saltville also appeared to suggest that the gas stored in its facilities would be gas primarily used in Virginia.⁸

8. Based on Saltville's representations regarding the market for storage of gas supplies for Virginia consumers, the Commission found that "[t]he evidence on this point is substantial and does not suggest that Saltville's plans are in bad faith or somehow designed to avoid Commission jurisdiction with a nominal or insignificant amount of

⁵Id. at P 44-45, citing Saltville's February 12, 2002 answer in Docket No. CP-02-73-000.

⁶Id. at P 45, citing Saltville's February 12, 2002 answer, Schedule B at 5.

⁷Saltville's answer filed in Docket No. CP02-73-000 on February 12, 2002, at 20.

⁸Saltville stated that "this storage project is being developed, first and foremost, as a storage company serving the needs of Virginia customers." Saltville's February 12, 2002, answer in Docket No. CP02-73-000, at 18. And "[t]o the extent any Saltville-stored gas does move out of Virginia (*i.e.*, to Saltville's non-Virginia customers), such gas will be stored pursuant to Saltville's § 284.224 certificate." Id. at 26. In responding to the Virginia Commission's question why Saltville was seeking a construction certificate from the Virginia Commission, Saltville's representative, Randall J. Riha, testified that "[f]irst and foremost, a substantial number of the customers that will be served by the LLC's storage facility will be located in Virginia. Thus, a great deal of gas will be consumed here." Id. at attached certificate application filed with Virginia Commission, Schedule B, Testimony of Randall J. Riha, at 5.

local business."⁹ Accordingly, the Commission found in an order issued on April 11, 2002, that Saltville's facilities and operations would qualify for the Hinshaw exemption in Section 1(c) of the NGA.¹⁰

Order Granting Limited Jurisdiction Certificate

9. When Saltville filed its application in this proceeding on August 23, 2002, for a limited jurisdiction certificate pursuant to Section 284.224 of the regulations, Dominion Greenbrier protested based on the grounds that for the foreseeable future Saltville will be storing relatively little, if any, gas for consumption in Virginia and therefore does not qualify for the Hinshaw exemption. Saltville acknowledged that it had no executed service agreements or precedent agreements at that time. However, Saltville indicated that it was actively negotiating service agreements for the storage of significant volumes of gas for consumption in Virginia and was not planning to place its storage facilities in service for several more months.¹¹ Saltville emphasized that there had been no changes with regard to its anticipated customer base as represented in Cargill v. Saltville.¹²

10. Based on Saltville's representations, the Commission issued its February 4, 2003, order granting Saltville's request for a limited jurisdiction blanket certificate pursuant to Section 284.224 of the regulations.¹³ However, the Commission's February 4 order directed Saltville to file new proposed rates complying with Section 284.123(b)(2) of the Commission's regulations.¹⁴

⁹99 FERC ¶ 61,043 at P 58.

¹⁰99 FERC & 61,043 (2002).

¹¹Id. 102 FERC ¶ 61,123 at P 1.

¹²Id. at P 23.

¹³102 FERC ¶ 61,123 (2003).

¹⁴Hinshaw pipelines are subject to the rate conditions of Section 284.123 by operation of Section 284.224(e). Section 284.123(d) sets forth a presumption that a Hinshaw pipeline's state-approved rates are fair and equitable (the standard set forth in Section 311 of the NGPA for services under that section) and not in excess of rates that the Commission would authorize an interstate pipeline to charge for similar services. In the February 4 order issuing Saltville's limited jurisdiction certificate, the Commission
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Requests for Rehearing

11. On March 3, 2003, Dominion Greenbrier, Inc. filed its request for rehearing of the February 4 Order. In its rehearing request, Dominion Greenbrier reiterates that Saltville should be fully subject to the Commission's NGA jurisdiction because Saltville has failed to show that it will store sufficient volumes of gas for consumption in Virginia to qualify for the Hinshaw exemption. Dominion Greenbrier asserts that the Commission cannot reasonably find that Saltville qualifies for Hinshaw status based on speculative expectations of eventually entering into service agreements with Duke Wythe and Henry County Power.

12. Dominion Greenbrier emphasizes that on January 27, 2003, a hearing examiner of the Virginia Commission issued an order recommending denial of Duke Wythe's application for a certificate to construct its power plant. Dominion Greenbrier also points out that even if Duke Wythe ultimately prevails and obtains a certificate, the Virginia Commission's proceeding nevertheless has been delayed so that it will be late 2004 at the earliest before Duke Wythe could be in a position to start receiving storage service from Saltville. Dominion Greenbrier also points out that both proposed power plants would have to rely on the Patriot Project's being constructed by East Tennessee Natural Gas Company (East Tennessee) to utilize Saltville's storage facilities.¹⁵ In view of the timing of the Patriot Project and the timing of the construction of Duke Wythe's and Henry County Power's plants, Dominion Greenbrier concludes that it will be late 2004, at the earliest, before either company will be ready to take any storage service from Saltville.

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determined that the rates filed by Saltville with the Virginia Commission would not satisfy the Commission's cost-based ratemaking policies, thereby rebutting the presumption in Section 284.123(d). 102 FERC at 61,331.

¹⁵The Commission certificated the Patriot Project on November 20, 2002. East Tennessee Natural Gas Company (East Tennessee), 101 FERC & 61,188 (2002). In addition to looping and compression on East Tennessee's existing mainline facilities, the Patriot Project includes a 93.6-mile mainline extension (Line 3600) from a point on East Tennessee's system near Wytheville, Virginia, to its interconnection with Transcontinental Gas Pipe Line Corporation at Eden, North Carolina. The project also includes a 7-mile lateral off the new mainline extension to a planned new power plant in Henry County, Virginia.

13. On March 6, 2003, Saltville filed its request for rehearing. Saltville argues that contrary to the finding in the February 4 order, Saltville's state-approved rates are sufficiently cost-based to satisfy the Commission's policies and regulations and therefore should be approved for Saltville's interstate services under Section 284.224.¹⁶

May 16, 2003, Order and June 17 Technical Conference

14. On April 7, 2003, the Commission's staff requested that Saltville provide information regarding any service agreements for the storage of gas supplies for consumption in Virginia. Saltville's April 11 data response did not identify any precedent agreements or executed contracts for the storage of gas for Virginia end users.

15. By Order dated May 16, 2003,¹⁷ the Commission directed Saltville to file additional information supporting its assertion of Hinshaw status. The Commission also directed its staff to convene a technical conference to address issues relating to Saltville's jurisdictional status.¹⁸

16. On June 2, 2003, Saltville filed a response as directed.¹⁹ On June 17, 2003, Commission staff convened a technical conference, as directed by the Commission's May 16 order. The Commission's staff prepared a summary of June 17 technical conference which was entered into the record of this proceeding on June 27, 2003.

17. On July 8, 2003, Saltville filed its own comments on the technical conference.²⁰

¹⁶In compliance with the Commission's direction in its February 4 order, Saltville filed proposed rates in Docket No. PR03-13-000 pursuant to Sections 284.224(3) and 284.123 of the regulations. On July 18, 2003, Saltville filed its Operating Statement, as required by Section 284.123.

¹⁷103 FERC ¶ 61,187.

¹⁸Id.

¹⁹Saltville filed both redacted and unredacted versions of its response and asked for privileged treatment under § 388.112 of the Commission's regulations for certain portions of the response.

²⁰Saltville included an attachment to its comments for which it requested privileged treatment under § 388.112 of the Commission's regulations.

18. On July 9, 2003, the Public Service Company of North Carolina (PSNC) filed comments in which it requests that, in the event the Commission exerts fully NGA jurisdiction over Saltville, the Commission not disturb the terms and conditions in PSNC's firm storage agreement with Saltville.

Saltville's Current Service Agreements

19. Following the June 17 technical conference, Saltville executed an agreement for a small amount of firm service with Virginia Gas Distribution Company (VGDC) to commence August 1, 2003. Saltville also has an agreement with VGDC for interruptible service. Besides VGDC, Saltville's only other current customer is PSNC.²¹ While VGDC's storage volumes will be consumed in Virginia, the volumes under its firm service agreement represent a very small part of the total firm storage volumes that Saltville currently has under contract and an even smaller percent of stage-one storage capacity. Conversely, PSNC's volumes, which will not be consumed in Virginia, represent the bulk of Saltville's total firm storage volumes.

Discussion

Saltville's Jurisdictional Status

20. The Natural Gas Act exempts from its provisions pipelines located entirely within a state that receive gas from interstate sources, as long as their rates and services are subject to regulation by the state commission and all of the gas is consumed within the state. The statute proclaims that such matters should be exempt because they are "primarily of local concern." As Saltville correctly observes, the statute speaks in absolutist terms.²² All of the gas must be consumed within the state to qualify for the exemption.

²¹Saltville's Response of July 8, 2003. Saltville considers the terms of the service agreements with VGDC commercially sensitive and the agreements, which were attached to the July 8 Response, are subject a request for privileged treatment.

²²Id. at 4.

21. Nevertheless, as Saltville emphasizes,²³ the Commission created an exception to this requirement in its regulations. Under Section 284.224, Hinshaw pipelines and local distribution companies may transport gas that ultimately leaves their states under the same terms that apply to intrastate pipelines providing service under NGPA Section 311(a). The point is, though, that the blanket certificate available under Section 284.224 is the *exception*.

22. In its application in this proceeding, Saltville stated that its market expectations as represented in *Cargill v. Saltville* had not changed, and it reiterated that “until receipt of the certificate authority requested ... Saltville’s service will be provided exclusively to Virginia customers”²⁴ While Saltville’s long range expectations may not have changed, the circumstances surrounding its efforts to establish a market in Virginia are different than they were when we first reviewed this project. Last January, for instance, the hearing examiner for the Virginia Commission recommended denial of Duke Wythe’s certificate application.²⁵ In addition, East Tennessee amended its certificate application for its Patriot Project to delay service to the Henry County facility until January 2005.²⁶ Thus, despite Saltville’s earlier statements that it had met with every Virginia LDC to discuss its proposed storage service and had several letters from Virginia companies stating that they would probably use the Saltville facility for storage services,²⁷ the only two specific in-state projects offered in support of Saltville’s Hinshaw status have been delayed. Whether or not either of these or any of the other LDCs with whom Saltville has had discussions will ultimately become a customer of Saltville is speculative at this point.

23. Nevertheless, at the June 17 technical conference held in this proceeding, Saltville offered the service agreement with its affiliate VGDC in fulfillment of its assertion that until it receives a blanket certificate, it will provide service exclusively to Virginia

²³Id.

²⁴Saltville’s August 23, 2002, application at 5.

²⁵Report of Michael D. Thomas, Hearing Examiner, Virginia State Corporation Commission Case No. PUE-2001-00721 (issued January 27, 2003).

²⁶East Tennessee’s June 26, 2002, amendment to Patriot Project application, Docket No. CP02-415-003, at 8.

²⁷99 FERC ¶61,043 at P 44.

customers.²⁸ The amount of capacity represented by this new agreement is very small; in fact, it is *de minimis*. And although Saltville describes its facility “first and foremost as a storage company serving the needs of Virginia customers,”²⁹ the description now appears to be based more on Saltville’s hopes for the future than on the current reality.

24. As discussed above, the record shows that Saltville has commenced service with agreements for a minimal amount of its capacity to be used to store gas that will be consumed in Virginia. The record contains no evidence that Saltville is close to reaching agreements that would result in most or even a significant portion of its storage capacity being used to store gas for Virginia consumers in the foreseeable future. Rather, the record indicates that almost all of the gas stored in Saltville's facilities in the foreseeable future will be gas stored on behalf of and ultimately delivered to consumers outside of Virginia. This satisfies neither the spirit nor the letter of Section 1(c) of the NGA and cannot be considered a matter "primarily of local concern" in any meaningful sense. Allowing Saltville to operate as a Hinshaw pipeline under these circumstances would turn the exception into the rule.

25. While the Commission has provided in its regulations for the issuance of limited jurisdiction certificates, it does not follow that there are no limits on how much of a company’s service can be dedicated to out-of-state service while the company continues to operate under an exemption that by its terms applies to "matters primarily of local concern." It hardly seems arguable, for instance, that a company that provides no service at all to customers within its state could qualify as an exempt Hinshaw pipeline, when the statute itself specifies that all gas must be consumed within the state. It seems scarcely less debatable that a company providing a *de minimis* amount of in-state service, as Saltville proposes in this case, should be able to claim the exemption. Again, the exception established by Section 284.224's limited jurisdiction certificates is an exception, not the rule.

26. Saltville acknowledges that VGDC's "contracted-for firm service level is small compared to the firm service level subscribed to by Saltville's one other customer to date

²⁸VGDC is an indirect subsidiary of NUI Corporation, which wholly owns one of Saltville’s limited partnership members, NUI Saltville Storage, Inc. Saltville’s July 8, 2003, comments at 3

²⁹99 FERC ¶61,043 at P 41-42.

[PSNC]."³⁰ However, because Saltville shares certain facilities with its affiliate, Virginia Gas Pipeline, "a Hinshaw company which owns and operates a state-regulated intrastate pipeline system and gas storage facility," Saltville asserts that a decision by the Commission to exercise full NGA jurisdiction would be burdensome and result in potentially inconsistent overlapping regulatory authority.³¹ Saltville asserts that allowing Saltville to commence service as Hinshaw would give appropriate recognition to the potential of Saltville's storage operations to facilitate the development of needed gas infrastructure in Virginia.³² Saltville also argues that it would not be inconsistent with Commission precedent to allow Saltville to commence service with its current minimal levels of in-state business.³³ Saltville also suggests that the Commission permit Saltville to commence service as a Hinshaw and defer any jurisdictional determination for three years while Saltville seeks additional in-state business.³⁴

27. The Commission recognizes that Saltville's extensive data responses in this proceeding show that it has been actively negotiating throughout this proceeding with many potential storage customers, including a number of customers that may eventually enter into service agreements to store gas supplies for use in Virginia. Nevertheless, Saltville has neither precedent agreements nor executed contracts other than the two already mentioned. Although Saltville has been seeking other customers within the state, there is no assurance that such customers will materialize. Acquisition of the two potential power plants as customers, for instance, depends on a chain of events that may or may not occur over the next several years. Saltville's jurisdictional status must be based on its current functions, not on speculation about what Saltville may do at some indeterminate time in the future.

³⁰Saltville's July 8, 2003, comments at 3.

³¹Id. at 7.

³²Id. at 6.

³³Id. at 5.

³⁴See summary of June 17 technical conference entered into the record on June 27, 2003.

28. Commission decisions cited by Saltville do not support a different result. First, Saltville incorrectly characterizes New York State Electric and Gas. Corp. (NYSEG)³⁵ as a case involving the construction of new gas storage facilities. When NYSEG filed its application for a Section 284.224 blanket certificate, it was an existing storage company with 2.34 Bcf of working gas capacity. All of its storage supplies were being consumed in New York. NYSEG was adding compression that would increase its injection and withdrawal capabilities, and it requested the Section 284.224 limited jurisdiction certificate so that it could store gas that might ultimately be transported out of New York for consumption elsewhere.

29. Similarly, LBU Joint Venture³⁶ involved a storage company with 900 Mmcf of working gas capacity. It had been in operation for 5 years. All of its gas supplies were being consumed in Tennessee. It also applied for a Section 284.224 limited jurisdiction certificate so that it could provide storage service for customers whose gas might leave Tennessee when it was withdrawn from storage.

30. Saltville misreads Lee 8 Storage Partnership (Lee 8)³⁷ as indicating that Lee 8, a new pipeline company planning to provide transportation and storage services, could qualify for Hinshaw status based on a representation that it anticipated in-state service that would account for only 20% of Lee 8's total subscribed capacity. In the proceeding, Lee 8 actually asserted that it was an intrastate pipeline because 20% of the volumes that it transported were produced and consumed in Michigan. It sought to transport non-Michigan production under Section 311 of the NGPA as an intrastate pipeline. The Commission found that, because the Michigan production was commingled with interstate supplies, Lee 8 was not an intrastate pipeline.³⁸ The Commission specifically declined to address whether Lee 8 might be able to qualify as a Hinshaw.³⁹ Subsequently, the Director of the Office of Pipeline Regulation, acting under delegated authority in an unprotested proceeding, granted Lee 8 a Section 284.224 limited jurisdiction certificate to

³⁵81 FERC ¶ 61,020 (1997).

³⁶88 FERC ¶ 61,035 (1999), reh'g 89 FERC ¶ 61,311 (1999), pet. for review dismissed, 2001 U.S. App. Lexis 4006.

³⁷73 FERC ¶ 61,159 (1995)

³⁸Id. at 61,478.

³⁹Id. at n. 9.

provide interstate service as a Hinshaw. Contrary to Saltville's assertion that in-state service accounted for only 20 percent of Lee 8's subscribed capacity, the Director's order found that *all* of the gas received by Lee 8 from interstate sources would be consumed in Michigan.⁴⁰

31. Saltville asserts that the Commission's order in Cargill v. Saltville is binding precedent in this case and requires a determination that Saltville's storage facilities qualifies as a Hinshaw facilities. As discussed above, the Commission's order in Cargill v. Saltville was based on representations made by Saltville in the record in that case. The record in this case indicates that these facts have since changed significantly. In that proceeding, Saltville represented that a significant amount of its business would be for customers in Virginia. The record in this proceeding demonstrates that is no longer the case, at least for the foreseeable future. Accordingly, the Commission's decision in Cargill does not determine the outcome of this proceeding.

32. In view of the Commission's determination that Saltville does not qualify for the Hinshaw exemption in Section 1(c) of the NGA, the Commission will direct Saltville to apply within 60 days pursuant to Part 157, Subpart A, of the Commission's regulations for a certificate authorizing the construction and operation of its facilities and pursuant to Part 284, Subpart G, for a certificate authorizing open-access service. However, as discussed above, Saltville commenced storage operations on August 1, 2003, and the Commission recognizes the need to avoid delaying the storage of gas supplies for the upcoming winter heating season. Therefore, the Commission will authorize Saltville to provide service under its Section 284.224 certificate until March 1, 2004, or, if earlier, the effective date of a certificate granted by the Commission to authorize service by Saltville pursuant to Part 284, Subpart G, of the regulations.⁴¹

Rate Issues and Saltville's Request for Rehearing

33. On August 29, 2003, the Commission issued an order approving rates in Docket No. PR03-13-000 for Saltville's services under the limited jurisdiction blanket certificate granted by the Commission's February 4 order in this proceeding. Accordingly, Saltville will have rates in effect for service that it provides during the interim period until March 1, 2004.

⁴⁰73 FERC ¶ 62, 185 (1995).

⁴¹See Egan Hub Partners, L.P., 73 FERC ¶ 61,334 at 61,932 (1995).

34. As stated above, PSNC requests that, in the event the Commission exerts full NGA jurisdiction over Saltville, the Commission not disturb the terms and conditions in PSNC's long-term firm storage agreement with Saltville. PSNC is a party in Docket No. PR03-13-000. It did not raise any objections to Saltville's proposed rates, terms and conditions in that docket.

35. Although the Commission's August 29, 2003 order in Docket No. PR03-13-000 approves rates that are higher than the state-approved rates originally proposed by Saltville in this proceeding, Saltville has not withdrawn its rehearing request, and we cannot say categorically that the request is moot. However, we will deny the request for the following reasons.

36. Saltville requests rehearing of the Commission's rejection of Saltville's state-approved rates as the rates for interstate transportation under its Section 284.224 blanket certificate. Saltville claims the Commission failed to explain its rejection of the state-approved rates, erred in concluding that the rates were not cost-based, and erred in finding that the state approved rates were not existing rates as required under the regulations.

37. Under the rate election provided by Section 284.123 (b) (1) (ii), a blanket certificate holder may use an intrastate rate approved by an appropriate state regulatory agency for comparable service. However, Section 284.1(b) defines an appropriate state regulatory agency as one that sets "rates and charges on a cost of service basis."⁴² The maximum rate set by the Virginia Commission is not cost-based and therefore does not satisfy this requirement. As Saltville describes the rate in its application for rehearing, the Virginia Commission allowed Saltville to charge rates for storage services that are within a specified range. "Saltville's range of acceptable rates consists of a band within which the cost justified rate is the mid-point. Saltville then increased that rate by 15% to derive the 'high' end of the range and discounted that rate by 15% to derive the 'low' end of the range."

⁴²"The standard is intended to encompass those transportation rates set by a state regulatory agency under a methodology which considers the cost of providing service rather the price that service can demand. By cost we intend to include operating costs as well as a reasonable return on investment." [Reg Preambles 1977- 1981] FERC Stat. & Regs. ¶ 30104 (1979), Order on Rehearing of Order No. 46. See also Lee 8 Storage Partnership, 75 FERC ¶ 61, 099 (2003) (excessive rate of return on equity cannot be deemed cost based).

38. Although the Commission has no objection to discounting a cost-based rate, it is clear from Saltville's own description of the state's rate methodology that there is no cost basis for the maximum rate allowed by the Virginia Commission. The cost justified rate is the midpoint. The rate that the Virginia Commission approved for Saltville is 15 % above what is allowable under Section 284.123(b)(1)(ii).

39. In addition, the Virginia Commission's approved rate does not comply with the requirements of Section 284.123(b)(1)(ii), because the rate was not "an effective transportation rate on file with the appropriate state regulatory agency" at the time Saltville filed its petition for a blanket certificate.⁴³ Specifically, Saltville filed its application for a blanket certificate with this Commission on August 23, 2002, but did not file its tariff with the Virginia Commission until January 22, 2003. Thus, Saltville did not have a rate for its intrastate services subject to the Virginia Commission's jurisdiction that was on file and in effect at the Virginia Commission before it filed for its blanket Section 284.224 certificate here.

40. The requirement to have an effective rate on file with a state commission is consistent with the purpose underlying the rule. In Order No. 46 the Commission rejected a suggestion that an intrastate pipeline should be allowed to file a new intrastate tariff and use it to support interstate rates under NGPA Section 311(a)(2), while approval of the state tariff was still pending. The Commission was concerned that the state agency might use different criteria to set NGPA Section 311 rates than it would for setting

⁴³Saltville is correct that the February 4 order erred in finding that the Virginia Commission rate failed to meet this requirement because it was not "a rate under which the entity is already providing service." Nonetheless, Saltville does not claim on rehearing that it otherwise met the express requirement under Section 284.123(b)(1)(ii) that the rate it proposed to use for Section 284.224 service was both on file with the state agency and in effect before Saltville filed its Section 284.224 blanket certificate application.

intrastate rates, since the agency's concerns might be different in the two situations.⁴⁴ This concern is especially present in a case where a substantial portion of a new company's initial service will be interstate service under either NGPA Section 311 or the NGA under a Section 284.224 blanket certificate. Accordingly, we reaffirm our interpretation of Section 284.123(b)(1)(ii). In order to qualify as "an effective transportation rate on file with the appropriate state regulatory agency," the rate must be on file with the state agency and in effect at the state agency before a company files its petition with this Commission.

The Commission orders:

(A) Dominion Greenbrier's request for rehearing of the Commission's February 4, 2003, order is granted.

(B) Saltville's request for rehearing of the Commission's February 4, 2003, order is denied.

(C) Within 60 days from the issuance of this order, Saltville is directed to file (1) an application for a certificate of convenience and necessity pursuant to Part 157, Subpart A, of the Commission's regulations to authorize construction and operation of its facilities, and (2) an application, including proposed initial rates and tariff terms and conditions, for a certificate of convenience and necessity pursuant to Part 284, Subpart G, of the Commission's regulations to authorize open-access transportation and storage service in accordance with the Commission's regulations and policies.

⁴⁴[Reg Preambles 1977- 1981] FERC Stat. & Regs. & 30081 at 30,540 (1979), Order No. 46. See also Montana Power Company, 74 FERC ¶ 61, 319 (1996) (intent of allowing state rate election was to set NGPA Section 311 transportation rates by reference to tariffs applicable to other intrastate transportation); PG&E Texas Pipeline, L.P., 89 FERC ¶ 62,003 (1999) (filing state tariff rate simultaneously with FERC application fails to meet the "then effective" requirement of the regulations). But see Virginia Gas Pipeline Company, 77 FERC ¶ 61,199 (1996), where the Commission's blanket certificate order accepted a state-approved rate that was in effect subject to refund at the time the FERC application was filed. The application was unopposed and the pending status of the rate was not discussed. That decision was inconsistent with our interpretation of Order No. 46 above, but the error need not be repeated here.

(D) Saltville is authorized to provide service under its Section 284.224 certificate until March 1, 2004, or, if earlier, the effective date of a certificate granted by the Commission to authorize service by Saltville pursuant to Part 284, Subpart G, of the regulations. Saltville shall charge the rates approved by the Commission's August 29, 2003, order in Docket No. PR03-13-000 for service under its Section 284.224 certificate.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.